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No. 544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, Roe R. Black, Avis C. Black, Roe C. Black, Black Ranches, Inc., a corporation, Debtor, and Thomas Hart Fisher, respectfully pray this Court's writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Eighth Circuit in this case,

and to remand the case to the District Court of the United States for the District of Nebraska for further proceedings in that court.

CITATION TO OPINIONS BELOW

The opinion and decision of the District Court of the United States for the District of Nebraska, insofar as Petitioners are informed, has never been officially reported.

The opinion and decision of the United States Court of Appeals for the Eighth Circuit in this case is reported in 362 Fed. (2d) 19, and is reprinted in full as Appendix I to this petition.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment rendered on May 12, 1966. Petitioners' petition for rehearing (with motions (1) that the language of the Court of Appeals' opinion be amended, and (2) that the Court of Appeals hear such petition and motion with such other judge or judges of some other United States Court of Appeals as might be designated by the United States Supreme Court) was denied without a supplemental opinion on June 21, 1966. This petition is filed within 90 days thereafter, in this Court.

This Court's jurisdiction is invoked under Section 1254(1) of the United States Judicial Code (U.S.C.A., Tit. 28, Sec. 1254(1)) which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals.

The United States District Court's jurisdiction was based upon the provisions of the Federal Bankruptcy Act (U.S.C.A., Title 11, Chap. 2, Section 2).

THE QUESTION PRESENTED FOR REVIEW.

The question for review is: Were Petitioners deprived of their rights under the Federal Bankruptcy Act because both the trial judge and the Court of Appeals held, in allowing Respondents' Claims Nos. 21, etc., in the amount of $110,117.40 as unsecured claims against the Debtor corporation, as well as in denying Petitioners' set-offs and counterclaims in the amount of $99,108.50 thereto, that Petitioners' objections, set-offs and counterclaims were in effect common law pleadings to such an extent that the failure of Petitioners to plead the defense of fraud in their objections to these Brando Claims Nos. 21, etc., as well as Petitioners' failure to plead a written contract signed by the Respondent Marlon Brando in Petitioners' set-offs and counterclaims to the Brando Claims Nos. 21, etc., prevented Petitioners from relying upon both said unpleaded defense of fraud and said unpleaded written contract, both of which were admittedly proven in this record.

Expressed in other words, the question here raised is whether Respondents' pleadings in the Bankruptcy Court prevented Respondents from relying upon proven fraud and a proven written contract signed by Respondent Marlon Brando, upon the theory that Respondents' pleadings are, like common law pleadings in a non-bankruptcy case, a limitation of the rights of the litigants, even though fraud on the part of the bankruptcy claimants (Brandos) was involved.

STATEMENT OF THE CASE.

This is a bankruptcy case which was instituted by five creditors against Black Ranches, Inc., a Nebraska corporation, under the corporate reorganization provisions of Chapter X of the Federal Bankruptcy Act, in the District Court of the United States for the District of Nebraska nearly twelve years ago on October 22, 1954. More than ten years later on December 4, 1964, the District Judge entered a judgment allowing Claims Nos. 21, etc., of Respondents against the Debtor as general unsecured claims in the amount of $110,117.40, and at the same time the District Judge denied and overruled Petitioners' set-offs and counterclaims in the amount of $99,108.50, upon the ground that Petitioners had not relied upon fraud in their objections to Claims Nos. 21, etc. and had not relied upon an express written contract signed by Respondent Marlon Brando in their set-offs and counterclaims thereto.

The primary question raised by the Brando Claims Nos. 21, etc., and by Respondents' set-offs and counterclaims thereto, is therefore whether under Federal bankruptcy law a bankrupt corporation's pleadings, *to-wit,* both its objections to creditors' claims and its set-offs and counterclaims thereto, are *in the nature of common law pleadings which limit the rights of the bankrupt corporation to the allegations of such objections, set-offs and counterclaims,* even though fraud on the part of the bankruptcy claimants is involved.

The holdings of both the trial judge and the Court of Appeals are summarized in the Appellate Court's opinion as follows (Appendix I, p. 24 below):

"In their objections to Brando's claims, appellants [Petitioners] alleged that the set-offs were due [the Debtor corporation]. The corporate resolution [a definite binding legal agreement signed by Brando], now so strenuously urged upon us, was not relied upon [in Petitioners' objections, set-offs and counterclaims] as a basis for the off-set, and Judge Delehant apparently viewed appellants' off-set as based on a *quantum meruit,* rather than an express contract, theory. *Having relied upon quantum meruit, appellants [Petitioners] cannot now switch their primary reliance to the corporate resolution [the signed agreement] and, thereby, to an express contract theory.* 'It is elementary that on appeal the appellant must adhere to the theory on which the case was tried in the lower court.' *Kirk* v. *St. Josephs Stock Yard Co.,* 206 Fed. (2d) 283, 287, and cases cited (8 Cir. 1953)." (Emphasis added.)

The first opportunity which Petitioners ever had to challenge the right of the trial judge to hold that they could not rely upon the defense of fraud to the Brando Claims Nos. 21, etc., in the amount of $110,117.40 and could not rely upon the signed Brando agreement in their set-offs and counterclaims, arose in the Court of Appeals, where this question was fully briefed and argued by Petitioners not only in their original briefs prior to the opinion and decision of that court, but also in Petitioners' Petition for Rehearing (and other relief) which they timely filed in the Court of Appeals after the decision and opinion had been rendered in that court affirming the trial court's judgment allowing Respondents' Claims Nos. 21, etc., in said amount of $110,117.40.

Petitioners have filed in this Court as No. 1825 Miscellaneous their "Motion for Leave to File Petition for Designation of at Least One Circuit Judge Now Sitting

on One of the United States Courts of Appeals for some Circuit Other Than the Eighth Circuit to Act Jointly with the Judges of the United States Court of Appeals for the Eighth Circuit in Passing Upon and Deciding the Petitions for Rehearing to be Filed by Petitioners as Appellants in Appeals Nos. 17990-1-2 in said Eighth Circuit Court."

Although said petition filed as No. 1825 Miscellaneous has not yet been ruled upon by this Court, Petitioners nevertheless desire to draw this Court's attention to such petition at this time, and to incorporate the same herein by reference thereto, since it is relevant to the issues raised by this Petition for Writ of Certiorari.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

It is a fundamental and well recognized principle of Federal Bankruptcy law that creditors' proofs of claim, on the one hand, and the objections, set-offs and counterclaims thereto of the Debtor corporation or its other creditors, on the other hand, *are not in the nature* of *common law pleadings which limit any of the litigants' rights,* especially where fraud on the part of the bankruptcy claimants is involved. *U. S.* v. *Duggan,* 210 Fed. (2d) 926 (8 CCA); *United Hotels Co.* v. *Mealey,* 147 Fed. (2d) 816 (2 CCA); *In re Annin & Co.,* 95 Fed. (2d) 381 (2 CCA); *Durrance* v. *Collier,* 81 Fed. (2d) 4 (5 CCA); *Horn* v. *Abts,* 19 Fed. (2d) 350 (8 CCA); *In re Germain,* 144 Fed. Supp. 678; *In re International Match Corp.,* 69 Fed. (2d) 73 (2 CCA).

On the contrary, under Federal bankruptcy law it is held that either a bankruptcy trustee or any other interested party has *the affirmative duty to defeat the allowance of fraudulent or improper claims against the bankrupt or its estate,* and by the same token the duty to assert the Debtor's set-offs and counterclaims thereto, *regardless of the form of the claim or the form of the objections, set-offs and counterclaims thereto. In re Brown,* 118 Fed. (2d) 198 (2 CCA); *In re Povill,* 105 Fed. (2d) (2 CCA); *B. F. Avery & Sons Co.* v. *Davis,* 192 Fed. (2d) 255 (5 CCA), cert. den. 342 U.S. 945; *Larcon Co.* v. *Wallingsford,* 136 F. Supp. 602; *American Anthracite etc. Coal Corp.* v. *Leonardo Arrivabene,* 280 Fed. (2d) 119 (2 CCA); *In re Woodmar Realty Co.,* 241 Fed. (2d) 768 (7 CCA).

It is unnecessary to add that there are other extremely important questions raised by this appeal which involve not only Federal bankruptcy law, but also the local law of Nebraska. However, it is not necessary for Petitioners to burden this Court with these other questions here, since the proper forum for their determination is obviously the District Court of Nebraska, to which this cause should be promptly returned by a reversal of the decision of the Court of Appeals for its fundamental error of Federal bankruptcy law.

CONCLUSION

Petitioners recognize that the granting of this Petition for Certiorari, as well as this Court's granting of Petitioners' petition in No. 1825 Miscellaneous, is discretionary with the Court, and that the granting of such writ and the allowance of such petition would not ordinarily result merely from error by either the District Court or the Court of Appeals, *unless such error controverts fundamental Federal law.*

However, in the case at bar both the trial judge and the Court of Appeals have rendered judicial decisions which violate a fundamental and well recognized principle of Federal bankruptcy law, by holding that a bankrupt corporation's responsive pleadings to creditors' claims are so much in the nature of common law pleadings as to deprive both the bankrupt corporation and other creditors of the relief to which they are plainly entitled on the record in the case, even though fraud on the part of the creditors as bankruptcy claimants has clearly been held to exist by the trial judge in this case. (See Court of Appeals'. Opinion, Appendix I).

The Court of Appeals in affirming the District Court's judgment upon the ground that the written agreement supporting Petitioners' set-offs and counterclaims in the

amount of $99,108,50, which was signed by Marlon Brando, is not binding upon him merely because it was not pleaded in the bankrupt corporation's set-offs and counterclaims to the Brando Claims Nos. 21, etc., has committed a flagrant violation of Federal bankruptcy law which clearly conflicts with applicable decisions not only of the Eighth Circuit Court of Appeals, but of the other Circuit Courts of Appeal as well.

This violation of Federal bankruptcy law is therefore so plain and so undeniable in this case that Petitioners respectfully submit that this case calls for an exercise of this Court's power of supervision, and it is therefore respectfully prayed that the Court should grant the prayer of the present petition accordingly.

PRAYER FOR PETITION FOR WRIT OF CERTIORARI.

Wherefore, Petitioners pray for the issuance of this Court's Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Eighth Circuit in the case of *"In the Matter of Black Ranches, Inc., a Nebraska corporation, Debtor; Roe R. Black, et al., Appellants, vs. Anna C. Brando, as Administratrix, etc., and Marlon Brando, Jr., Appellees,"* No. 17991, reported in 362 Fed. (2) 19, and to remand this case to the District Court of Nebraska for further proceedings in that Court, to the end that Petitioners' Federal rights herein claimed may be effectuated.

Respectfully submitted,

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